Supreme Court, U. S.
FILED
SEP 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1187

JOSEPH BAXTER, *et al.*,

Petitioners,

v.

NICHOLAS A. PALMIGIANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

STEPHEN J. FORTUNATO, JR.
McKINNON & FORTUNATO
1168 Newport Avenue
Pawtucket, R.I. 02861
(Rhode Island Affiliate,
American Civil Liberties
Union)

McKINNON & FORTUNATO
1168 Newport Avenue
Pawtucket, R.I. 02861

DAVID CARLINER
1511 K Street
Suite 931
Washington, D.C.

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

INDEX

Page

TABLE OF AUTHORITIES iii

CONSTITUTIONAL PROVISIONS, AND STATUTES AND REGULATIONS INVOLVED 1

QUESTIONS PRESENTED FOR REVIEW 4

SUMMARY OF ARGUMENT 5

ARGUMENT

I. IN AN ADVERSARY CONFRONTATION BETWEEN A PRISONER AND PRISON OFFICIALS, SITTING AS A DISCIPLINARY BOARD WITH POWERS TO INVESTIGATE FACTS AND METE OUT PUNISHMENT, THE PRISONER MUST HAVE THE ASSISTANCE OF COUNSEL "TO GUARANTEE FULL EFFECTUATION OF [HIS] PRIVILEGE AGAINST SELF-INCRIMINATION . . .", WHEN THE SAME CIRCUMSTANCES GIVING RISE TO THE DISCIPLINARY HEARING ALSO EXPOSE HIM TO FUTURE STATE CRIMINAL PROSECUTION 8

II. THE POST-CONVICTION TRILOGY OF *WOLFF v. MCDONNELL* 418 U.S. 539, 41 L.Ed.2d 935 (1974), *GAGNON v. SCARPELLI*, 411 U.S. 778, 36 L.Ed.2d 656 (1973) AND *MORRISSEY v. BREWER*, 408 U.S. 471, 33 L.Ed.2d 484 (1972) DO NOT IN ANY WAY VITIATE RESPONDENT PALMIGIANO'S CLAIM TO THE ASSISTANCE OF COUNSEL AT A DISCIPLINARY HEARING WHEN THE CHARGES HE WAS CALLED UPON TO ANSWER COULD ALSO GIVE RISE TO A CRIMINAL PROSECUTION 19

Page

III. THE PRISON DISCIPLINARY HEARING, BY OPERATING ON THE PREMISE THAT RESPONDENT PALMIGIANO'S SILENCE AT THAT HEARING WOULD BE CONSIDERED AGAINST HIM, UNCONSTITUTIONALLY BURDENED RESPONDENT'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, AND VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW 23

A. The purpose of the Fifth Amendment bars the prison officials in this matter from considering Palmigiano's silence against him 23

B. The petitioning prison officials, by claiming the right to infer guilt from silence, violated Palmigiano's Fourteenth Amendment right to due process of law, for notions of logic and fundamental fairness imbedded in the due process clause, as well as common law rules of evidence, forbid such an inference 34

IV. THERE IS NOTHING IN *WOLFF v. MCDONNELL* THAT SUGGESTS THAT THIS COURT HAS IN ANY WAY ABROGATED THE WELL-SETTLED PRINCIPLE THAT A PERSON MAY NOT BE COMPELLED TO GIVE STATEMENTS INCRIMINATING HIMSELF UNLESS HE RECEIVES A GRANT OF IMMUNITY COEXTENSIVE WITH THE FIFTH AMENDMENT PRIVILEGE 37

CONCLUSION 45

Page

TABLE OF AUTHORITIES

Cases:

Avant v. Clifford, 341 A.2d 629 (N.J. 1975) 40

Brown v. Walker, 161 U.S. 591 (1896) 43

Counselman v. Hitchcock, 142 U.S. 547 (1892) 24,43

Escobedo v. Illinois, 378 U.S. 478, (1964) 12

Fowle v. United States, 410 F.2d 48 (9th Cir. 1969) 34

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 19,20

Gardner v. Broderick, 392 U.S. 273 (1968) ..25,26,28,29,41

Garrity v. New Jersey, 385 U.S. 493 (1967) ..... *passim*

Gideon v. Wainwright, 372 U.S. 335 (1963) 13

Griffin v. California, 380 U.S. 609 (1965) 30

Grunewald v. United States, 353 U.S. 391 (1957) .. 33,35,36

Hoffman v. United States, 341 U.S. 478 (1951) 28

Johnson v. New Jersey, 384 U.S. 719 (1966) 8,13

Johnson v. United States, 318 U.S. 189 (1943) 34,37

Johnson v. Zerbst, 304 U.S. 458 (1938) 14

Kastigar v. United States, 406 U.S. 441 (1972) 6,41

Kirby v. Illinois, 406 U.S. 682 (1972) 12,13,18

Lefkowitz v. Turley, 414 U.S. 70 (1973) ..... *passim*

McCarthy v. Arndstein, 266 U.S. 34 (1924) 24

McGautha v. California, 402 U.S. 183 (1971) ... 32,33,42,43

Mannes v. Meyers, 419 U.S. 449 (1975) 15,16,17,42,43

Massiah v. United States, 377 U.S. 201 (1964) 18

Mathis v. United States, 391 U.S. 1 (1968) 5,6,8,11,21

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Morris v. Travisano, 310 F.Supp. 857 (D.R.I.1970) 4

Morrissey v. Brewer, 408 U.S. 471 (1972) 19

Page

Palmigiano v. Baxter, 487 F.2d 1280 (1973) . . 24, 26, 28, 36, 38

Palmigiano v. Baxter, 510 F.2d 534 (1974) . . . . . *passim*

Powell v. Alabama, 287 U.S. 45 (1932) 14, 18

Sanitation Men Association v. Commissioner, 392 U.S. 280 (1968) 25, 26, 29

Santobello v. New York, 404 U.S. 257 (1971) 44

Slochower v. Board of Higher Education, 350 U.S. 551 (1956) 33, 37

Spevack v. Klein, 385 U.S. 511 (1967) . . . 25, 26, 27, 28-29, 40

Ullman v. United States, 350 U.S. 422 (1956) 6, 33, 43

United States v. Ash, 413 U.S. 300 (1973) 13, 18

United States v. Hale, U.S. , 45 L.Ed.2d 99 (1975) 35, 36-37

United States v. Wade, 388 U.S. 218 (1967) 13, 18

Wolff v. McDonnell, 418 U.S. 539 (1974) . . . . . *passim*

Wolff v. McDonnell, 342 F.Supp. 616 (D.Neb.1972) 21

Statutes:

37 Stat. 443, Compulsory Testimony Act of 1893 43

R.I.G.L. 11-25-2, Assault or escape by a maximum custodial unit inmate 3

R.I.G.L. 11-38-5, Incite to riot at correctional institution 3

R.I.G.L. 11-44-1, Malicious destruction of property or obstruction of lawful pursuits 3

R.I.G.L. 12-17-15, Compelling evidence in criminal proceedings—immunity 2, 39

Miscellaneous:

J. Wigmore, Evidence (Chadbourn rev. 1970) 34

Page

"Judicial Intervention in Prison Discipline 63 J. Crim. L., Criminology and Police Science, 200 (1972) 8

Kadish, "The Advocate and the Expert—Counsel in the Peno-Correctional Process." 45 Min. L. Rev. 803 (1961) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1187

JOSEPH BAXTER, *et al.*,

Petitioners,

v.

NICHOLAS A. PALMIGIANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED

Amendment V of the United States Constitution provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . .

Amendment VI of the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused . . . [shall] have the assistance of counsel for his defense."

Amendment XIV of the United States Constitution provides, in pertinent part,:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . .

R.I.G.L. (Rhode Island General Laws) 12-17-15 is titled "Compelling Evidence in Criminal Proceedings-Immunity," and provides:

> In any criminal proceeding before the superior court or in any criminal proceeding or investigation before a grand jury, if a person refuses to answer a question or produce evidence of any kind on the ground that he may be incriminated thereby, and if the Attorney General, in writing, requests the presiding justice of the superior court to order that person to answer the question or produce the evidence, the said court in its discretion after notice to the witness may order the person to answer the question or produce the evidence. In deciding such matters the presiding justice shall consider whether the person may be incriminated thereby in some other jurisdiction. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence. But he may nevertheless be

> prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering or failing to answer, or in producing, or failing to produce evidence in accordance with the order.

R.I.G.L. 11-38-5 is denominated "Incite to riot at correctional institution" and provides:

> Any person who, with intent to cause a riotous assembly at the Adult Correctional Institution, shall incite a riot or a continuance of a riot or destruction of property while rioting, shall, upon being found guilty of said offence, be fined not exceeding ten thousand ($10,000.00) dollars, or shall be imprisoned not exceeding ten (10) years, or both.

R.I.G.L. 11-25-2 is denominated "Assault or escape by a maximum custodial unit inmate" and provides as follows:

> Every prisoner confined in the maximum custodial unit of the adult correctional institutions or in the custody of the warden or other officer while outside the confines of the institutions, who shall assault the warden, or other officer of said institution, or shall escape, or attempt to effect an escape shall be sentenced by the court to a term of imprisonment in the adult correctional institutions for not less than one (1) year no more than twenty (20) years, except where the original sentence was imprisonment for life, said term to commence from the expiration of the original term of such prisoner.

R.I.G.L. 11-44-1 is denominated "Malicious destruction of property or obstruction of lawful pursuits" and provides as follows:

> Every person who shall wilfully and maliciously or mischievously injury or destroy the property of another, or obstruct the use of the property of another, or obstruct another in the prosecution of his lawful business or pursuits, in any manner, the punishment whereof is not specially provided for by statute, shall be fined not exceeding one hundred ($100.00) dollars or be imprisoned not exceeding one (1) year.

The so-called Morris Rules, which governed disciplinary procedure at the Adult Correctional Institutions in Rhode Island at the time of Palmigiano's disciplinary hearing are set out, in pertinent part in Petitioners' Appendix, pp. 203-212. Contrary to the declaration of the Attorney General in his Brief for the Petitioners, p. 3, these rules do not appear in identical form in *Morris v. Travisono,* 310 F.Supp. 857 (DRI 1970), but rather reflect some amendments subsequent to the decision of the United States District Court in that case. In short, the rules as reproduced in the Appendix were in effect at the time of Palmigiano's difficulty in November 1973; the rules as printed in *Morris v. Travisono, supra,* were not.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a prisoner brought before an in-prison disciplinary board to answer to charges based upon allegations that could also give rise to a future criminal prosecution is entitled to the assistance of counsel in order to secure the proper effectuation of his Fifth Amendment privilege against self-incrimination?

2. Is the Fifth Amendment privilege against self-incrimination impermissibly burdened when prison officials inform a prisoner appearing before a disciplinary board that his silence will be considered against him?

3. Whether a prisoner's proper assertion of his Fifth Amendment privilege against self-incrimination at a prison disciplinary hearing may be overcome only by a grant of use immunity?

SUMMARY OF ARGUMENT

Your Respondent, Nicholas A. Palmigiano, incarcerated under sentence of law at the Adult Correctional Institutions, Howard, Rhode Island, argues that a prisoner is entitled to the assistance of counsel when, as here, he is brought before a prison disciplinary board to answer charges for an in-prison infraction arising from a set of facts that could also lead to a future criminal prosecution. Counsel's presence is needed not to cross-examine witnesses or to assist in the presentation of a factual or legal defense but to guarantee the proper effectuation of the prisoner's Fifth and Fourteenth Amendment privilege against self-incrimination. While it may be debatable as to whether Palmigiano may properly advance a Sixth Amendment claim to the assistance of counsel, inasmuch as he had not been formally charged by way of indictment or information, Palmigiano urges that because he was advised that criminal charges were a likelihood he faced interrogation in a custodial situation, he was entitled to at least the Fifth Amendment protection secured by this Court in *Mathis v. United States,* 391 U.S. 1 (1968) and *Miranda v. Arizona,* 384 U.S. 436 (1966). Even had he not been advised that criminal charges might be

preferred against him, a man of reasonable prudence and caution could assume that the in-prison charge of inciting a riot could also lead to a criminal trial in the State courts. *Mathis, supra,* puts to rest any governmental contention that *Miranda, supra,* does not apply in those situations where the person being interrogated is incarcerated for reasons separate and apart from the subject matter giving rise to the custodial interrogation.

It is beyond debate that the Fifth Amendment privilege may be asserted regardless of the situation or proceedings at which government officials seek to elicit information. And because the Fifth Amendment is so fundamental to our jurisprudence, one who seeks its protection cannot have his silence considered as evidence of his guilt, see, e.g. *Ullman v. United States,* 350 U.S. 422 (1956), nor may State officials compel the abandonment of a proper claim of the privilege against self-incrimination except by a grant of use immunity. See, e.g. *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Kastigar v. United States,* 406 U.S. 441 (1972).

The prisoner brought before a prison disciplinary board to face charges of a nature that could also eventually confront him in a criminal proceeding must decide whether to remain silent or exercise his due process right to speak. He clearly needs counsel to assist him in making this delicate decision; and even were immunity to be granted, he needs the assistance of counsel to guarantee that the use immunity grant is a proper and effective one and that questions put to the prisoner subsequent to the grant are not outside its scope.

There is nothing in this Court's decision in *Wolff v. McDonnell,* 418 U.S. 539 (1974) that suggests that the

Constitution requires anything less than the protection Palmigiano seeks. Palmigiano does not in any way press for a modification of this Court's holding in *Wolff*; rather, he suggests that the issue he now raises was not before the Court in *Wolff,* and that it is perfectly logical at this point in time to conduct prison disciplinary hearings according to the guidelines set down in *Wolff,* except in those circumstances, such as presented here, where a criminal prosecution looms as a real possibility for the inmate who is brought before the disciplinary board.

Faced as he was with the real possibility of criminal prosecution for violation of Rhode Island criminal statutes, including but not limited to incitement to a riot and assault, see, p. 3 supra, Palmigiano was clearly entitled to all the protections that this Court has consistently held are available to the criminal suspect.

The United States Court of Appeals for the First Circuit asserted nothing new or novel when it held that a prisoner in Palmigiano's circumstances was entitled to the assistance of counsel and could not be further interrogated in the face of a Fifth Amendment claim. *Palmigiano v. Baxter,* 510 F.2d 534 (1974); Petition for Writ of Certiorari, Appendix, p. 10.[1]

---

[1]One theme of the argument advanced by the Attorney General for the State of Rhode Island on behalf of the petitioning prison officials is that lawyers will obstruct the disciplinary proceedings which, according to the Attorney General, are always conducted in a fair and decent manner. (Brief for the Petitioners, pp. 18, 22, 24, 30). In support of this contention, the Attorney General has included in his Appendix, without the agreement of counsel for the respondent, a letter from a prison official and charts regarding the activities of the prison disciplinary board (App. 239-242) none of which was

I.

IN AN ADVERSARY CONFRONTATION BETWEEN A PRISONER AND PRISON OFFICIALS, SITTING AS A DISCIPLINARY BOARD WITH POWERS TO INVESTIGATE FACTS AND METE OUT PUNISHMENT, THE PRISONER MUST HAVE THE ASSISTANCE OF COUNSEL "TO GUARANTEE FULL EFFECTUATION OF [HIS] PRIVILEGE AGAINST SELF INCRIMINATION . . .",[2] WHEN THE SAME CIRCUMSTANCES GIVING RISE TO THE DISCIPLINARY HEARING ALSO EXPOSE HIM TO FUTURE STATE CRIMINAL PROSECUTION.

Inmate Palmigiano submits that *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966) and *Mathis v. United States*, 391 U.S. 1, 20 L.Ed.2d 381 (1968), and not *Wolff v. McDonnell*, 418 U.S. 539, 41 L.Ed.2d 935 (1974), govern the situation in which he found himself. Reviewing this matter after its remand, for considera-

included in the record below. Respondent respectfully suggests that this portion of the Appendix, and references to it in the Brief, be disregarded.

More worthy of consideration is a study of the disciplinary procedures at the Adult Correctional Institutions, Howard, Rhode Island conducted by the Harvard Center for Criminal Justice, "Judicial Intervention in Prison Discipline," 63 J.Crim.L., Criminology and Police Science, 200 (1972). This study does not deal directly with the legal issues before this Court, but it does examine the attitude of prison officials who conduct the disciplinary hearings; the study concludes that the hearing officers are heavily biased toward conviction.

[2]*Johnson v. New Jersey*, 384 U.S. 719, 729, 16 L.Ed.2d 882, 890 (1966).

tion in light of *Wolff, supra*, 418 U.S. 908 (1974), the United States Court of Appeals for the First Circuit declared:

> We now alter what we said concerning the remaining issue, the right to counsel, confined to a situation where future prosecution is contemplated. Again the *Wolff* ruling does not directly apply. This particular problem is more akin to that presented in *Miranda v. Arizona*, 384 U.S. 436 (1966), where the Court was concerned with "circumstances surrounding in-custody interrogation [which] can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators." 384 U.S. at 469-70. *Mathis, supra*, applied Miranda's reasoning to those already in prison. It follows, therefore, that the *Miranda* solution must be foremost in the minds of prison administrators. They must make it quite clear to an inmate who is under threat of criminal prosecution that while he has a due process right to speak, he is under no compulsion to do so. If the inmate chooses to remain silent, he must not be questioned further. Moreover, in cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let in to the disciplinary proceedings not because *Wolff* requires it in that proceeding, but because *Miranda* requires it in light of future criminal prosecution. 510 F.2d 534, 537 (1974) (Petition for Writ of Certiorari, Appendix A, pp. 13-14)

There is no dispute but that Palmigiano was in a custodial situation, confined as he was as the Adult Correctional Institutions, Howard, Rhode Island; moreover, he was removed from the general prison population to a separate room in order to confront the disciplinary tribunal. Nor is there any dispute that

prisoner's counsel was barred from entry into the room, despite Palmigiano's request that counsel be present; and further, it is clear that Palmigiano had been advised, prior to the hearing, that criminal charges might be preferred against him.

In *Miranda, supra,* this Court chronicled at great length the "inherently compelling pressures" that descend upon a criminal suspect in a custodial atmosphere. 384 U.S., at 443-467, 16 L.Ed.2d, at 706-719. These pressures become even more overbearing where, as here, the detainee has been told that his silence will be used against him and the interrogators themselves have the authority to hand out immediate punishment, separate and distinct from that which could follow a later criminal prosecution. Moreover, there was no procedure available to Palmigiano by which he could absent himself from this confrontation.[3]

---

[3]Under the so-called Morris rules, in the discretion of the guard who observed the alleged infraction, an inmate charged with a minor infraction may be given the opportunity to elect between an appearance before the disciplinary board and "administrative loss of institutional privileges for a period of up to two nights." Rule 1 (A) (1) provides:

> "If the officer or employee considers the imposition of discipline necessary for a minor offence, he may at his discretion present the inmate with the option of a written charge and subsequent appearance before a disciplinary board, or administrative loss of institutional privileges for a period of up to two nights." App. 203.

Rule V(C) speaks to the consequences one may expect depending upon the course of action a prisoner follows in the face of the choices that may be presented to him regarding a minor violation:

> "...If the right to be granted a hearing for a minor violation is exercised, the disciplinary record must indicate:

The interrogation[4] of Palmigiano behind prison walls is analogous to the situation presented to this Court in *Mathis v. United States,* 391 U.S. 1, 28 L.Ed.2d 381 (1968). There, the Court rejected the government's contention that the holding of *Miranda* was "applicable

---

> (1) that the option of loss of institutional privileges for one of two nights has been tendered and refused; (2) if disposition in excess of the aforementioned two days is meted out, the supporting explanation must be included on the record. If the right to a disciplinary hearing is waived, the violation shall in no way appear on the inmates record or upon any record placed before the Parole Board or Classification Board. Records of all such minor violations for which the right to a disciplinary hearing is waived shall be maintained for one year, and a copy shall be given to the inmate when the penalty is imposed." App. 210.

But where, as here, the inmate is accused of a serious violation of prison regulations, no such election is made available to him; the Morris rules mandate dispatch on the part of prison officials to bring the inmate before the disciplinary board. Rules I(B) and (C), II(A), (B), (C), (D), (E), (F). App. 204-206.

When a guard observes a serious infraction he has no alternative but to commence the mechanism which leads inexorably toward the disciplinary board, regardless of the inmate's preferences:

> When an employee or officer considers a written charge and full disciplinary procedures necessary for proper discipline and control, he must show in writing on an inmate violation report form inmate's name, housing work assignment, if applicable; time, date, place and charge; give known details concerning the alleged violation, and sign the report. Rule 1 (D) App. 204.

[4]The Morris rules clearly empower the disciplinary board members with the function of interrogation:

> "The board members may interrogate the inmate and others as necessary." Rule III (C)(3). App. 207.

only to questioning one who is 'in custody' in connection with the very case under investigation." 391 U.S. at 4, 20 L.Ed.2d 381. The principle distinction between the two cases, namely that Palmigiano was told before his interrogation that criminal charges were likely and *Mathis* was not, would seem to put Palmigiano in a stronger posture, for the Rhode Island prison officials cannot be heard to excuse or justify their actions by a claim that they had no idea what their investigation would unearth or that their attention was not riveted particularly to Palmigiano. Palmigiano, as a reasonable man, could have no doubt that the crime had been solved so far as the prison officials were concerned, and hence, his request for counsel.

Palmigiano's situation is enough akin go that which confronted Danny Escobedo, *Escobedo v. Illinois,* 378 U.S. 478, 12 L.Ed.2d 977 (1964); he also asserts a Sixth Amendment right to counsel. But see, *Kirby v. Illinois,* 406 U.S. 682, 689, 32 L.Ed.2d, 411, 417-418 (1972). Unlike Danny Escobedo, Palmigiano caught more than a fleeting glimpse of his counsel, *Escobedo, supra,* 378 U.S., at 480, 12 L.Ed.2d, at 980, but rather by prearrangement he met his attorney at the hearing room door. App. 125. Immediately prior to the hearing, Palmigiano was advised in the presence of his counsel that he could remain silent but that his silence could be held against him. App. 146. This admonition from Deputy Warden Remillard was understandable, albeit unconstitutional, in light of the Morris rules which provide that the inmate "shall admit or deny the charges" preferred against him, Rule III (C) (2), App. 207 but make no provision for the alternative of remaining silent.

Substituting the words "prison officials" for the word "police," the holding of *Escobedo, supra,* appears to be applicable to the matter now before the Court:

> We hold, therefore, that where, as here the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused as been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the constitution as 'made obligatory upon the states by the Fourteenth Amendment' *Gideon v. Wainwright,* 372 U.S. at 342, 9 L.Ed.2d at 804, 93 ALR 2d 733, and that no statement illicited by the police during the interrogation may be used against him at a criminal trial. 378 U.S., at 490-491, 12 L.Ed.2d at 986.

Recognizing that "the Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda,* 'to guarantee full effectuation of the privilege against self-incrimination . . .' " *Kirby v. Illinois,* 406 U.S. 682, 689, 32 L.Ed.2d 411, 417, citing *Johnson v. New Jersey,* 384 U.S. 719, 729, 16 L.Ed.2d 882, 890, 86 S Ct 1772, respondent Palmigiano submits that he was subjected to a confrontation of the type that could well determine his fate before his arrival in the courtroom. *United States v. Wade,* 388 U.S. 218, 235-236, 18 L.Ed.2d 1149, 1162, (1967) See, *United States v. Ash,* 413 U.S. 300, 37 L.Ed.2d 619 (1973).

But whatever the applicability of the Sixth Amendment to a preindictment, pre-trial interrogation by prison officials relative to circumstances surrounding a transaction that is at one and the same time a violation of both prison rules and State law, this Court's decisions leave no doubt that the proper effectuation of the purpose of the Fifth Amendment privilege against self-incrimination during a custodial interrogation requires the assistance of counsel.

When in *Powell v. Alabama,* 287 U.S. 45, 69, 77 L.Ed. 158 (1932), the Court spoke of the "guiding hand of counsel", it recognized that counsel's presence was needed "at every step in the proceedings", not as a mere ornament to satisfy an ancient constitutional mandate, but as an active ally and agent to assist the accused through the maze of evidence and procedure at trial, and apparently at pre-trial hearings as well. See also *Johnson v. Zerbst,* 304 U.S. 458, 462-463, 82 L.Ed 1461 (1938).

Powell, supra, and *Johnson v. Zerbst, supra,* rested primarily upon the Sixth Amendment; however in *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed.2d 694 (1966), this Court clearly declared that the intricacies surrounding the claim of the Fifth Amendment privilege made the presence of counsel imperative:

> . . . the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. . . .
>
> The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercian is reduced, and if coercian is nevertheless exercised the lawyer can testify to it in Court. The presence of a lawyer can also help to guarantee that the accused give a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. 384 U.S. at 459-470, 16 L.Ed.2d, at 721.

More recently, though in the context of a civil proceeding, the Court once again articulated the historic rationale for the inseparable connection between an effective exercise of the privilege against self-incrimination and the presence of counsel:

> The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; and it can be affirmatively waived, or lost by not asserting it in a timely fashion. *Mannes v. Meyers,* 419 U.S. 449, 460, 42 L.Ed.2d 574, 587-588 (1975)[5]

A prisoner in Palmigiano's predicament is even more in need of the assistance of counsel than an accused in

---

[5]In his opinion, Mr. Chief Justice Burger of course noted that counsel was "lawfully present" at the civil proceeding under Texas procedure. 419 U.S., at 465, 42 L.Ed.2d, at 587 (fn 14)

Prisoner Palmigiano submits that the reasoning of the Court is equally applicable where, as here, the Court reviews his contention that counsel must be allowed into the disciplinary hearing so that his privilege against self-incrimination will not be "drained of its meaning". 419 U.S., at 465, 42 L.Ed.2d, at 587.

the circumstances that obtained in *Miranda, supra,* for in the matter under review, the prisoner had to confront not only immediate in-prison disciplinary charges but also the specter of a future criminal prosecution. His election to forego his due process right to speak and remain silent was met with a threat that his silence would be considered against him. Further complications present themselves when we consider the ever-present possibility of a lawfully coerced abandonment of the privilege against self-incrimination as a consequence of a grant of "constitutionally imposed use immunity". *Mannes v. Meyers,* 419 U.S. 449, 479, 42 L.Ed.2d 574, 592 (1975) (concurring opinion of White, J.).[6]

[6]The Morris rules contain a provision which directs prison officials to advise the inmate that statements he makes at a disciplinary hearing are protected by something remotely similar to constitutionally imposed use immunity:

> Whenever an inmate is charged with an institutional violation which may be the subject of criminal prosecution, the written notice . . . shall so notify the inmate, and advise him that although statements he makes in his defense at a disciplinary hearing are probably not admissable for affirmative use by the prosecution at a trial, he may wish to consult an attorney to determine what action to take. Rule II (I), App. 206.

Palmigiano was not advised at any time that his statements would not be used against him at any future criminal prosecution; but in any event, it is Respondent Palmigiano's position that a declaration that statements "are probably not admissable for affirmative use by the prosecution at a trial" falls far short of the assurance necessary to overcome a proper invoking of the Fifth Amendment privilege against self-incrimination. More than vague and tentative promises that lead the untutored prisoner into the area of speculation and conjecture are needed to legally compel the abandonment of the "essential mainstay of our adversary system". *Miranda v. Arizona,* 384 U.S. at 460, 16 L.Ed.2d, at 715.

Faced with a number of considerations and options arising out of the confluence of the Fifth Amendment privilege, the due process right to speak, and a potential use immunity grant, the inmate is enmeshed in an area of the law that is perplexing enough for lawyers, let alone an incarcerated lay person, and needs the assistance of counsel for at least five reasons:

(1) To explain the ramifications of invoking the testimonial privilege or exercising his due process right to speak;

(2) To explain to him the effect of a grant of immunity upon the privilege against self-incrimination;

(3) To assure that what the prison officials suggest is a grant of immunity is in fact a grant of immunity for the circumstances that precipitated the disciplinary action and the possibility of prosecution;

(4) To assure that the inmate, through a lack of knowledge, does not remain silent in the face of an immunity grant, thereby exposing himself to additional deprivation of his liberty for contemptuous behavior;

(5) To guarantee that the questions put to the prisoner by his custodians do not overreach the limits of the grant of immunity.[7]

Though formal charges had not been preferred against Palmigiano by way of complaint, indictment, or information, he had been advised by a prison official that criminal charges were a likelihood and that he

[7]This Court has implied that an attorney may sometimes give good faith advice to a client to remain silent even in the face of a grant of immunity; this, of course, would be a rare occurance, but it remains one factor militating in favor of counsel's presence at Palmigiano- and Mathis-type confrontations. *Maness v. Meyers,* 419 U.S., at 462 , 42 L.Ed.2d, at 585 (fn. 10) (1975).

should consult an attorney. Moreover, he was forced into a face-to-face confrontation with government officials, in this case his permanent custodians, who sought to interrogate him, and not merely display or examine his person, see, e.g., *United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149 (1967), and *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed.2d 411 (1972), or view his photograph. See *United States v. Ash*, 413 U.S. 300, 37 L.Ed.2d 519 (1973).

Kirby v. Illinois, supra, does not in any way attenuate Palmigiano's Fifth Amendment claim to the assistance of counsel in the circumstances under review by this Court, for the decision adhered to the distinction noted in *United States v. Wade, supra,*[8] between statements of a "testimonial" nature and physical characteristics and activities, even speaking, that may serve to identify a person but do not communicate the history of an allegedly criminal event. *Kirby*, 406 U.S., at 687-688, 32 L.Ed.2d, at 416.

Although the primary 'subjective intent of the members of the disciplinary board may well have been

---

[8]*Wade* observed that *Miranda v. Arizona, supra,* inserted counsel into custodial interrogations as a guarantor of the implementation of the Fifth Amendment, but went on to note:

> . . . nothing decided or said in the opinions in the cited cases [including *Miranda*] links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions 'no more than reflect a constitutional principle established as long ago as *Powell v. Alabama* . . . .' *Massiah v. United States*, supra, 377 U.S., at 205, 12 L.Ed.2d at 250. It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in Court or out, where counsel's absence might derogate from the accused's right to a fair trial. 388 U.S., at 226, 18 L.Ed.2d, at 1157.

to administer in-prison discipline, with little or none of their attention directed toward the outcome of any future criminal prosecution, one very possible necessary consequence of their inquiry was the eliciting of an incriminatory statement that could well obliterate the prisoner's right to a fair trial and make a guilty verdict a foregone conclusion. No matter how benign the subjective intentions of the prison officials may be, their quest for order and swift discipline within the prison walls remains inextricably entwined with their search for incriminatory statements on the part of the inmate before them.

II.

THE POST-CONVICTION TRILOGY OF *WOLFF V. MCDONNELL*, 418 U.S. 539, 41 L.ED.2D 935 (1974), *GAGNON V. SCARPELLI*, 411 U.S. 778, 36 L.ED.2D 656 (1973) AND *MORRISSEY V. BREWER*, 408 U.S. 471, 33 L.ED.2D 484 (1972) DO NOT IN ANY WAY VITIATE RESPONDENT PALMIGIANO'S CLAIM TO THE ASSISTANCE OF COUNSEL AT A DISCIPLINARY HEARING WHEN THE CHARGES HE WAS CALLED UPON TO ANSWER COULD ALSO GIVE RISE TO A CRIMINAL PROSECUTION.

In the recent past this Court has in *Wolff v. McDonnell, supra, Gagnon v. Scarpelli, supra,* and *Morrissey v. Brewer, supra,* measured the requirements of minimum due process against the claims of those threatened with a restriction of liberty additional to that previously imposed upon them by sentence of a

court of law. In weighing the competing interests and delineating appropriate safeguards, the Court was never asked to rule on the issue presented in the instant matter. There is no suggestion in any of the aforementioned three cases that a prisoner at a probation or parole revocation hearing, or before a prison disciplinary tribunal, ever alleged that the nature and circumstances of the proceeding in which he was involved required that he had the assistance of counsel to secure his testimonial privilege under the Fifth Amendment.

At the outset, it may be noted that in *Morrissey v. Brewer, supra,* the Court expressly did "not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent". 408 U.S., at 489, 33 L.Ed.2d, at 499.

In *Gagnon v. Scarpelli, supra,* the Court reiterated the principle that except in those cases that clearly require counsel pursuant to the Sixth Amendment and its *per se* rule fashioned in emending decisions, claims for the assistance of counsel should be examined on a "case-by-case approach". *Gagnon, supra,* 411 U.S., at 788, 36 L.Ed.2d, at 665. *Gagnon* went on to declare that counsel should be provided to the probationer or parolee who denies the violation that subjects him to a potential cancellation of his paroleor probation, or when, even in the face of violation, the probationer and parolee faces a complex task procedurally in presenting reasons in justification or mitigation. 411 U.S., at 790, 36 L.Ed.2d, at 666. The matter was, of course, remanded for a further inquiry regarding Respondent Scarpelli's claim for the assistance of counsel, but for the purposes of the case here under review, Scarpelli's

claim, unlike Palmigiano's, was that he needed a lawyer's assistance to help him present a defense showing that a confession made prior to the revocation hearing itself was given under duress, and not because he required counsel's assistance during a custodial interrogation where he would be confronted with difficult decisions and options regarding the Fifth Amendment, use immunity and his due process right to speak. 411 U.S., at 791, 36 L.Ed.2d, at 667.

Similarly, the prisoners in *Wolff v. McDonnell, supra,* did not advance any argument for the assistance of counsel grounded in the Fifth Amendment and *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed.2d 694 (1966), and *Mathis v. United States*, 391 U.S. 1, 20 L.Ed.2d 381 (1968). Nowhere does the decision of this Court or that of the trial court, 342 F.Supp. 616 (D.Neb. 1972), make any reference to such an assertion or suggest that in any way such a claim was under review. Counsel for the petitioning prison officials speculates (Brief for the Petitioner, p. 10) that the alleged misconduct of the prisoners in *Wolff* may have also given rise to criminal sanctions; but again, the issue was not presented and there is nothing in the decision of the trial Court, or of this Court, to indicate that the prisoners in that matter, unlike Palmigiano, were ever threatened with criminal prosecution.

Respondent Palmigiano, then, does not, and in light of *Wolff,* could not, contend for the ingress of counsel into all disciplinary hearings, but merely asserts the very narrow proposition, as did the United States Court of Appeals on remand, 510 F.2d 534, 537, that *Miranda v. Arizona, supra,* and *Mathis v. United States, supra,* have continuing vitality behind both precinct and prison walls. The contention of the Petitioners that prisoners

in Palmigiano-type predicaments are not entitled to counsel is tantamount to asserting that conviction and incarceration consign one a diluted and ineffective version of the Fifth Amendment until one's sentence has been fully served.[15]

[15]The Attorney General of the State of Rhode Island also argues that lawyers should be excluded from disciplinary hearings, even though a criminal prosecution could follow, because they are obstructionists. (Brief for the Petitioners, pp. 16-18). In support of this position, the Attorney General attributes the following statement to Professor Sanford Kadish:

> "Lawyers [are] masters of the art of frustration, sworn to advance the cause of their client rather than the truth and hence prime instigators of delay and diversion." (Brief for the Petitioners, pp. 16-17)

An examination of Professor Kadish's article reveals that he has been egregiously misquoted and his opinion distorted beyond recognition. Professor Kadish, in fact, wrote:

> "On the other hand, some of the apprehension that lawyers would bog down the system is less than real, stemming from the layman's traditional distrust of lawyers as masters of the art of frustration, sworn to advance the cause of their client rather than the truth and hence prime instigators of delay and diversion." Kadish, "The Advocate and the Expert–Counsel in the Peno-Correctional Process," 45 Minn. L. Rev. 803, 838 (1961).

III.

THE PRISON DISCIPLINARY HEARING, BY OPERATING ON THE PREMISE THAT RESPONDENT PALMIGIANO'S SILENCE AT THAT HEARING WOULD BE CONSIDERED AGAINST HIM, UNCONSTITUTIONALLY BURDENED RESPONDENT'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, AND VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

A. The purpose of the Fifth Amendment bars the prison officials in this matter from considering Palmigiano's silence against him.

The petitioning prison officials, in their brief, argue that prison authorities acted within constitutional bounds in advising prisoner Palmigiano that if he remained silent before the prison disciplinary board which was to hear charges against him, his silence would be considered a factor against him, and that the disciplinary board itself acted constitutionally in considering Respondent's silence as some evidence of guilt. (Brief for the Petitioners, 28, 31.) Against this, Palmigiano contends that this procedure violated his Fifth and Fourteenth Amendment privilege against self-incrimination, in that its effect was to force him to choose between speaking with the attendant risk of self-incrimination, and remaining silent only to have his silence serve as a statement of guilt.

It is of no consequence legally that Palmigiano relied on the privilege at a prison disciplinary hearing, for this Court has consistently held that the privilege against

self-incrimination does not depend upon the nature of the proceeding in which the testimony is sought, but may be asserted in any proceeding, be it civil or criminal, administrative or judicial, formal or informal, when the declarant believes the statements could eventually incriminate him. See e.g. *Lefkowitz v. Turley*, 414 U.S. 70, 38 L.Ed.2d 274, (1973); *McCarthy v. Arndstein*, 266 U.S. 34, 69 L.Ed. 158, (1924).

The charges brought against Respondent were to be heard by a prison disciplinary board, which had the power to place Respondent in punitive segregation, and to deprive him of privileges normally available to inmates, including rehabilitative and educational activities, visitation privileges, and reading privileges. (App. 208). To accompany these charges with a threat that guilt would be inferred from silence, violates the historic purpose of the Fifth Amendment "to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime". *Counselman v. Hitchcock*, 142 U.S. 547, 562, 35 L.Ed. 1110 (1892); *Lefkowitz v. Turley, supra.* Respondent Palmigiano faced the constitutionally repugnant dilemma, described by the First Circuit in its initial consideration of this case, "of either remaining silent and risking greater punishment from the disciplinary board or speaking out in his own defense and risking self-incrimination in a subsequent criminal prosecution". *Palmigiano v. Baxter*, 487 F.2d 1280, 1288 (1973); App. 226.

Inmate Palmigiano truly faced "a choice between the rock and the whirlpool". *Garrity v. New Jersey*, 385 U.S. 493, 496, 17 L.Ed.2d 562 (1967). The police

officers in *Garrity*, like Palmigiano, were informed that they might be subjected to future criminal prosecution, and that their silence would be held against them. In *Garrity* the Court found such a procedure unconstitutional, embodying "the antithesis of free choice to speak out or to remain silent". *Garrity v. New Jersey*, 385 U.S., at 498, 17 L.Ed.2d, at 566.

Similar procedures, in which government employees were dismissed from employment because they refused to sign waivers of immunity and to testify after having been called before administrative or grand jury proceedings investigating charges of corruption, were condemned as violative of Fifth Amendment rights in *Gardner v. Broderick*, 392 U.S. 273, 20 L.Ed.2d 1082 (1968), and *Sanitation Men Association v. Commissioner*, 392 U.S. 280, 20 L.Ed.2d 1089 (1968).

A proceeding to discipline a lawyer for professional misconduct was unconstitutional when it imposed, as a price for refusing to provide incriminating testimony or documents, the dishonor of disbarment and deprivation of livelihood. *Spevack v. Klein*, 385 U.S. 511, 17 L.Ed.2d 574 (1967). This Court has also ruled unconstitutional a state statute which cancelled a contractor's government contracts and disqualified him from further transactions with the state, upon the contractor's refusal to waive his right to silence and immunity in state proceedings at which he was questioned about his contracts with the state. The Court held that the threat of such economic sanctions had the effect of unconstitutionally compelling a threatened individual to waive his Fifth Amendment rights. *Lefkowitz v. Turley, supra.*

In the instant case, the prisoner was threatened with thirty days of punitive segregation during which time he

would be locked in his cell twenty-three hours a day, prohibited from mingling with the general prison population, and from participating in work and educational activities; he necessarily faced severe restrictions on visitation and reading privileges. To a prison inmate such deprivation can be as serious a loss as the loss of government contracts might be to a contractor, or disbarment to a lawyer, or public employment to a civil servant. As the Court of Appeals for the First Circuit observed in its initial consideration of this case, "In a prison setting where liberty is by necessity shrunken to a small set of minor amenities, such as work or schooling privileges, visitations and some modicum of privacy, it is likely that any marked change of status which forecloses such liberties will be perceived and felt as a grievous loss.[9] *Palmigiano v. Baxter*, 487 F.2d 1280, 1284, (1973); App. 219.

To be sure, Respondent Palmigiano resisted the proceeding's coercive pressure to testify, as did the attorney in *Spevack v. Klein, supra,* the public employees in *Gardner v. Broderick, supra,* and *Sanitation Men Association v. Commissioner, supra,* and the contractor in *Lefkowitz v. Turley,* supra. Nevertheless, as these cases make clear, a government proceeding is rendered unconstitutional when "the State intend[s] to accomplish what *Garrity* specifically prohibited—to

[9]The First Circuit made this observation in determining that an inmate's stake in prison disciplinary decisions was sufficient to require some due process regardless of any eventual criminal sanctions. However, the observation is equally relevant to the issue of whether Palmigiano's hearing placed him under an unconstitutional compulsion to speak.

compel testimony that has not been immunized." *Lefkowitz v. Turley,* 414 U.S., at 82, 38 L.Ed.2d, at 284. While the Rhode Island prison officials never expressly stated that their purpose was to compel Palmigiano's testimony, Palmigiano submits that the prison authorities' subjective intention, whatever it may have been, does not in any way lessen the coercive effect of informing him that his silence would be held against him.[10] It is the effect of the threat upon the prisoner that is controlling, not the motives or objectives of his interrogators.

The Rhode Island prison officials have sought to distinguish the disciplinary hearing in the instant case from the hearings found unconstitutional in *Garrity v. New Jersey, supra,* and *Spevack v. Klein, supra,* on the grounds that the hearings in those cases were conducted for the express purpose of gathering evidence for a criminal trial. (Brief for the Petitioner, p. 30). Such a distinction is wholly unwarranted, and is based, among other things, on an erroneous characterization of the fact situation described in *Spevack v. Klein, supra.*

Spevack concerned the constitutionality of a hearing to discipline an attorney for his alleged misconduct. There is no suggestion in the language of that decision that any state authority contemplated future criminal prosecution against the attorney. *Spevack,* then, suggests that it is the threat levied against the invoking of the Fifth Amendment privilege, and not a contemplated

[10]The prison officials argue in their brief that "common sense tells any person that silence often means inference of guilt". (Brief for the Petitioner, p. 30).

criminal prosecution, that is the controlling factor. And indeed, since the privilege against self-incrimination attaches except when it is "perfectly clear, from a careful consideration of all the circumstances in the case, that . . . the answer cannot possibly have such tendency" to incriminate. *Hoffman v. United States,* 341 U.S. 478, 488, 95 L.Ed. 1118, 1125, (1951). The function of the privilege would be obliterated if a condition precedent to its exercise were the bringing of formal charges, be they by way of indictment, information or complaint.[11]

Moreover, as the First Circuit observed in its decision prior to the remand of this case, ". . . [S]tate prosecutors are apt to be interested in gathering evidence concerning a wide range of offenses occurring both inside and outside the prison walls, and implicating may prisoners. . . ." Therefore "defendants within a prison disciplinary hearing may have an understandable fear of 'fishing expeditions' designed to gather information". *Palmigiano v. Baxter,* 487 F.2d, at 1289.

In another respect prisoner Palmigiano's circumstances place him in a stronger posture than the individuals who claimed Fifth Amendment protection in *Gardner v. Broderick, supra, Garrity, supra,* and

[11]But even if the constitutionality of the penalty were dependant on some type of official and irrevocable declaration that a future criminal prosecution was likely, Respondent Palmigiano's situation presents a more compelling case for the necessity of Fifth Amendment protections than that under review in *Spevack,* for unlike Attorney Spevak, Palmigiano was expressly informed by prison authorities that the incident on which his disciplinary charge was based might also result in criminal prosecution. (Appendix, p. 184)

Spevack, supra. In *Garrity, supra,* and *Gardner v. Broderick, supra,* state officials sought the testimony of police officers, public employees whose integrity is crucial to state law enforcement. Despite the state officials' legitimate business, even duty, of assessing the loyalty and fitness of such public employees, the Court held that the state could not lawfully dismiss them from employment for refusing to answer questions relating to the performance of their official duties, unless the potential for self-incrimination had been eliminated by a grant of use immunity from criminal prosecution. See also, *Sanitation Men Association v. Commissioner, supra.*

And in *Spevack* the attorney's status as an officer of the court did not deny him the protection of the Self-Incrimination Clause so as to render constitutional his disbarment for refusing to testify or produce documents whose preservation was required by court rule. Palmigiano, as a private citizen confined in prison as a convicted felon, owed no such special affirmative duties to the authorities questioning him at the prison disciplinary hearing, making the penalty imposed on his silence even more clearly impermissible than visited upon the civil servants in the aforementioned cases.

The prison officials argue that the prison disciplinary procedure here under review is distinguishable from *Garrity, Spevack* and *Lefkowitz* in that the penalties imposed in those three cases were automatic upon the exercise of the Fifth Amendment privilege, while the penalty imposed on inmate Palmigiano did not follow immediately and necessarily from his silence. Against this, respondent contends that the fact that his silence, immediately upon being exercised, would be held against him by the triers of fact did place an

immediate, unconstitutional burden on his Fifth and Fourteenth Amendment rights. The consequence of his silence was as automatic a penalty as was the procedure found unconstitutional in *Griffin v. California*, 380 U.S. 609, 14 L.Ed.2d 106, reh. den. 381 U.S. 975, 14 L.Ed.2d 730 (1967). There, the failure of the defendant in a criminal trial to take the stand was commented upon by both prosecuting attorney and the court, the court instructing the jury, *inter alia*, that:

> As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify . . . the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorably to the defendant are the more probable. *Griffin v. California*, 380 U.S., at 610, 14 L.Ed.2d, at 107.

This Court held that such comment on the refusal to testify was a remnant of the "inquisitorial system of criminal justice" outlawed by the Fifth Amendment, and was a penalty imposed for the exercise of constitutional rights. *Griffin v. California*, 380 U.S., at 614, 14 L.Ed.2d, at 109-110. It may be noted that comments on the defendant's silence in *Griffin* did not foreclose the possibility of ultimate acquittal by the jury. The trial court instructed the jury only that it was permitted to draw adverse inferences from defendant's silence. Despite this merely permissive language, the court's instructions were held to be an impermissible burden on the defendant's right to remain silent. In contrast to the procedure found unconstitutional in *Griffin*, prison authorities at Palmigiano's disciplinary

hearing stated that his silence would be held against him. It seems then that the penalty imposed on him for his silence was more of a certainty than the guilty verdict returned against the petitioner in *Griffin, supra.*[12]

Palmigiano does not contend in any way that every adverse consequence flowing from an individual's assertion of his right to remain silent is an unconstitutional penalty on that right. Certainly a criminal defendant must often make difficult judgments as to which of two or more alternatives to pursue, and the Constitution does not always forbid requiring that he make a choice. Thus, it is not difficult to imagine that a person who testifies at his trial and obtains an

---

[12]In further support of their argument that the penalty imposed on inmate Palmigiano did not automatically follow from his silence, Petitioners refer to a chart which they have incorporated in the Appendix. (Brief for the Petitioners, p. 30, Appendix 241) This chart is in two sections, the first purporting to show the disposition of disciplinary hearings for the period from December 1974 through June 1975, (Appendix 241), and the second purporting to show dispositions for the period from December 1973 through November 1974. (Appendix 242). This chart, however, is not a portion of the record below, and was improperly included in the Appendix, Rule 26 of Rules of the Supreme Court. Moreover, the chart was prepared by a party to the proceedings subsequent to the trial of this matter; and respondent respectfully urges that all references to the chart, and the chart itself be disregarded.

Should the chart be consulted, prisoner Palmigiano submits that although the chart purports to show that some inmates have been found "Not Guilty" by the disciplinary board, there is no indication on the chart that any of these inmates remained silent at their hearings. Thus, even if the chart is an accurate record of the disciplinary hearings at the Rhode Island Adult Correctional Institution, it provides no basis for determining, as Petitioners' contend, that the penalty for remaining silent at a disciplinary hearing is not automatic.

acquittal might regret his earlier decision to remain mute before an administrative tribunal. Recently, this Court, in *McGautha v. California*, 402 U.S. 183, 28 L.Ed.2d 711, (1971), referred to some of the required choices which are constitutionally acceptable. Thus, a defendant can be forced to choose whether to take the stand on his own behalf, thereby exposing himself to cross-examination and possible self-incrimination, or to remain silent, thereby losing his own testimony as part of his defense. He can also be required to make a similar choice when the risk involved in testifying is impeachment by proof of prior convictions.

McGautha itself held constitutionally acceptable a trial procedure that required a defendant to choose between taking the stand in order to testify relevant to the issue of punishment, thereby risking damage to his case on guilt before a jury which had not yet decided that issue, and remaining silent, thereby losing his right to personally present mitigating factors to the jury on the issue of punishment. The Court reasoned that this single verdict jury system could do no more than prevent a defendant from bringing to the jury's attention evidence peculiarly within his own knowledge relating to the issue of punishment, while still affording him opportunity to present extensive background data through other witnesses. In one sense, the decision to be made by the criminal defendant in *McGautha* was no more difficult or risk-laden than the typical strategic choices which are continually made in any criminal trial. This court therefore answered in the negative "the threshold question of whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved". *McGautha v. California*, 402 U.S., at 213, 28 L.Ed.2d, at 729.

The dilemma faced by Respondent Palmigiano in the prison disciplinary proceedings, however, does violence to the purpose of the Fifth Amendment. The criminal defendant in *McGautha*, had he chosen to remain silent, retained the benefit of the presumption of innocence, and did not have his silence considered as evidence of guilt. Inmate Palmigiano was told in effect to relinquish his Fifth and Fourteenth Amendment rights and testify in order to avoid having his silence treated as evidence of guilt. Such a choice appreciably impairs fundamental policies behind the Fifth Amendment privilege against self-incrimination.

One of the basic functions of the privilege against self-incrimination is "to protect the innocent who might otherwise be ensnared by ambigous circumstances." *Slochower v. Board of Higher Education*, 350 U.S. 551, 558, 100 L.Ed. 692, 700 (1956). As this Court has stated:

> Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. *Ullmann v. United States*, 350 U.S. 422, 426, 100 L.Ed. 511, 518, (1956). (dictum)

This basic function of protecting the innocent is severely impaired if an individual's exercise of the privilege is treated, as was inmate Palmigiano's, as evidence of guilt. It is beyond debate that an individual's silence in reliance on his Fifth Amendment privilege may not be used as substantive evidence of guilt. *Grunewald v. United States;* 353 U.S. 391, 1 L.Ed.2d 931 (1957) *Slochower v. Board of Higher*

Education, supra; Johnson v. United States, 318 U.S. 189, 87 L.Ed.2d 704 (1943).

As the Ninth Circuit Court of Appeals has aptly observed, "It would be anomalous indeed if honorable law enforcement officers were required to elaborate upon the traditional fifth amendment warning and advise arrested persons in effect: 'If you say anything, it may be used against you. You have the constitutional right to remain silent, but if you exercise it, that fact may be used against you.'" *Fowle v. United States,* 410 F.2d 48, 54 (9th Circ. 1969)

B. The petitioning prison officials, by claiming the right to infer guilt from silence, violated Palmigiano's Fourteenth Amendment right to due process of law, for notions of logic and fundamental fairness imbedded in the due process clause, as well as common law rules of evidence, forbid such an inference.

The Rhode Island prison authorities contend that the prison disciplinary board should be permitted to infer that Palmigiano's silence was evidence of guilt, because "common sense tells any person that silence often means an inference of guilt". [sic] (Brief for the Petitioners, p. 30). In answer, respondent concedes that silence in the face of an accusation may under certain circumstances, be probative of agreement, 3A J. Wigmore, Evidence 1042 (Chadbourn rev 1970), but declares that these circumstances do not obtain when such silence is maintained by a person in prisoner Palmigiano's situation in reliance on his Fifth Amendment privilege.

An individual's silence in the face of accusation may be probative of his acquiescence only if it would have been natural under all the circumstances for him to object to the assertion in question. *United States v. Hale,* U.S. , 45 L.Ed.2d 99 (1975). In the instant matter, Palmigiano's silence was certainly as consistent with an inference of innocence as with one of guilt.

Prior to the disciplinary hearing, he had been informed by prison authorities that he might face criminal prosecution. The Morris Rules required telling him that his statements at the disciplinary hearing were "probably not admissable for affirmative use by the prosecution at a trial", App. 206, though he was not advised in accordance with this rule nor was he given use immunity at the hearing. Thus, when he appeared before the disciplinary board, Palmigiano had good reason to fear that any statements he made would be used to build a criminal case against him, and could perhaps be used at a subsequent criminal trial. Under such circumstances, it is understandable that he would be unwilling to give testimony which could be used by the Government in building its incriminating chain. For his statements, though consistent with innocence, might nonetheless tend to incriminate. See *Grunewald v. United States,* 353 U.S. 391, 1 L.Ed.2d 931, (1957).

Palmigiano's situation at the prison disciplinary hearing was similar to that of the arrestee in the recent case of *United States v. Hale, supra,* and to that of the witness called to testify before the Grand Jury in *Grunewald v. United States, supra.* Like the arrestee and the witness, Palmigiano knew that he was considered a potential criminal defendant at the time he chose to exercise his privilege to remain silent. Thus it was "natural for him to fear that he was being asked

questions for the very purpose of providing evidence against himself". *Grunewald v. United States,* 353 U.S. at 423, 1 L.Ed.2d at 954. Like both the arrestee and the grand jury witness, Palmigiano was not represented at his disciplinary hearing by counsel. And as with the arrestee and the grand jury witness before their interrogators, Palmigiano's presence before the prison disciplinary board was compelled.[13]

Petitioning prision authorities suggest that silence may be considered some evidence of guilt because of the informal setting of the disciplinary hearing. (Brief for the Petitioners, p. 30) In answer, Palmigiano suggests that whether or not the disciplinary hearing was "informal" has no bearing on the probative weight of his silence. Rather, the factors discussed above, specifically, his compelled attendance at the hearing, the absence of counsel, and most importantly, his status as a potential criminal defendant and the fact that his silence was claimed under the Self-Incrimination Clause, establishes that his silence could not be used to infer guilt.[14]

Additionally, it is worthy of note that in *Grunewald v. United States, supra,* and *United States v. Hale,*

[13]See fn. 3, *supra.*

[14]Nor did the First Circuit in its pre-*Wolff* decision state policy reasons for permitting the disciplinary board to consider Palmigiano's silence as some evidence of guilt, as the Rhode Island prison officials suggest. (Brief for the Petitioners, p. 31) Rather, the extended quote from the court's decision prior to remand, cited in Petitioners' brief at pp. 31-32, when read in context, states policy reasons for granting an inmate use immunity in a prison disciplinary hearing. *Palmigiano v. Baxter,* 487 F.2d, at 1289 ; Appendix pp. 228-229.

supra, this Court rejected the use of defendants' prior silence for the limited purpose of impeaching their testimony at trial. In Palmigiano's case, the prison disciplinary board treated his silence substantively, to infer guilt. Such treatment is even more clearly impermissible than was the use of silence for the collateral purpose of impeachment. The prison disciplinary board, therefore, could not legitimately draw any inferences whatsoever "from the legal assertion by the witness of his constitutional right". *Johnson v. United States,* 318 U.S. at 196-7, 87 L.Ed. at 711, without denying to Palmigiano "the protection of the individual against arbitrary action, which Mr. Justice Cardozo characterized as the very essence of due process". *Slochower v. Board of Higher Education,* 350 U.S., at 509, 100 L.Ed., at 700-701.

IV.

THERE IS NOTHING IN *WOLFF V. MC-DONNELL* THAT SUGGESTS THAT THIS COURT HAS IN ANY WAY ABROGATED THE WELL-SETTLED PRINCIPLE THAT A PERSON MAY NOT BE COMPELLED TO GIVE STATEMENTS INCRIMINATING HIMSELF UNLESS HE RECEIVES A GRANT OF IMMUNITY COEXTENSIVE WITH THE FIFTH AMENDMENT PRIVILEGE.

When the United States Court of Appeals for the First Circuit reviewed Palmigiano's situation prior to *Wolff v. McDonnell, supra,* it sought to strike a balance

between the prisoner's right to be protected from incriminating himself in a criminal prosecution through the use of statements extracted from him at a prior disciplinary board hearing, and the prison officials' concern with order and discipline behind the prison walls. The Court reasoned that a grant of use immunity would accommodate the interests. *Palmigiano v. Baxter*, 487 F.2d 1280, 1289-90 (1973); App. 229. In effect, the Court declared what Palmigiano here submits is the only constitutionally permissible way to allow prison officials to gather information from the mouth of the prisoner; that is, when immunity is given the State officials sacrifice the prisoner's own words as evidence against him at a future criminal prosecution and must rely on independent evidence, if any, at that time, but their immediate interest in disciplining the prison swiftly through information obtained directly from him will be secured.

The court reasoned:

> The provision of use immunity reflects a rational accommodation between the imperatives of the privilege against self-incrimination and the legitimate requirements of prison disciplinary procedures. In order for this immunity to be helpful to the inmate, however, it would be necessary that he be informed of its existence and its consequences at the prison disciplinary hearing. 487 F.2d, at 1290.

The court did not elaborate upon this statement or address the question as to whether prison officials, absent a statute, could grant immunity to a prisoner at a disciplinary hearing, thereby binding the office of the

Attorney General to the prudential decision of the disciplinary board.[16]

There was no discussion of use immunity in *Wolff v. McDonnell, supra,* but on remand from this Court, the Court of Appeals reexamined its original position:

> . . . Since prison officials themselves lack the authority to grant immunity, formal judicial proceedings and a full stenographic transcript would be required. Our prior opinion did not take such considerations into account.
>
> While reaffirming our holding as to [Palmigiano], we amend our prior opinion by withdrawing our declaration as to a general right on the part of the prison authorities to compel testimony and a general right on the part of inmates to use immunity when they come before a disciplinary board. *Palmigiano v. Baxter*, 510 F.2d 534, 536 (1974).

The Court of Appeals, however, did not deviate from the controlling principle:

> An inmate subjected to . . . interrogation is entitled to be advised of his right to remain silent, and cannot be further interrogated should he choose not to speak. His silence may not be used against him at that time or in future proceedings, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); see *Garrity v. New Jersey*, 385 U.S. 493 (1967);

---

[16]Rhode Island immunity statute, R.I.G.L. 12-17-15, set out in full at p. iv, *supra,* clearly does not empower prison officials to grant immunity in return for the abandonment of the testimonial privilege. Only the Attorney General, under the supervision of the Presiding Justice of the Superior Court, may compel testimony in return for the immunity grant.

Spevack v. Klein, 385 U.S. 511 (1967). *Palmigiano v. Baxter*, 510 F.2d, at 536-7.

Thus, Palmigiano now argues to this Court that if a prisoner who is exposed to criminal prosecution may properly invoke the Fifth Amendment privilege against self-incrimination in the face of questioning by a prison disciplinary board, he may not be coerced into speaking by violence or threats of any kind; and he remains secure within the protective ambit of the Self-Incrimination Clause until such time as he receives unequivocal and legally cognizable assurance that his statements may not be used against him in a criminal prosecution. There is nothing in *Wolff v. McDonnell, supra*, that suggests a contrary conclusion, nor does the fact that the Court of Appeals for the First Circuit ultimately concluded that the prison officials lack the legal power to confer immunity in any way suggest that that court was deviating from the principle that only a grant of immunity can force the surrender of a proper Fifth Amendment claim. Indeed, in support of its declaration that a prisoner in Palmigiano's circumstances had an absolute and unconditional right to remain silent and that his "silence may not be used against him at that time or in future proceedings," the court cited a recent immunity decision of this Court, *Lefkowitz v. Turley*, 414 U.S. 70, 38 L.Ed.2d 274 (1973); *Palmigiano v. Baxter*, 510 F.2d 534, (1974).

Palmigiano does not say that he has an absolute right to immunity on demand[17] and that prison officials

[17]One court has reasoned that since the inmate has a right to speak, he must be advised "of the existence and consequence of . . . use immunity." *Avant v. Clifford*, 341 A.2d 629, 655-666 (N.J. 1975). In effect, the New Jersey Supreme Court seems to allow the prisoner to say, "I will give a statement and you will give me use immunity, whether you like it or not."

have the concomitant absolute duty to grant immunity at his request. What he does contend, however, is that he must be granted use immunity in the prison disciplinary board context when he is exposed to future criminal prosecution in order for him to be required to answer the questions put to him. *Lefkowitz v. Turley, supra; Kastigar v. United States*, 406 U.S. 441, 32 L.Ed.2d 212 (1972); *Gardner v. Broderick*, 392 U.S. 273, 20 L.Ed.2d 1082 (1968).

Nor does Palmigiano seek to isolate himself from all adverse consequences that may flow from his remaining silent. Certainly, if he were to receive immunity, and then persist in remaining silent, he could receive in-prison discipline.[18]

[18]A Fifth Amendment claim could not at that time overcome the actions of prison officials. For silence without any lawful basis, Palmigiano could perhaps be charged pursuant to infraction (a) listed under the section entitled Punishable Conduct in the so-called Morris Rules:

> "(A) Disobeying a lawful order of the Department Director, Assistant Director, Warden, Assistant Warden, or any officer or employee of the institution, or any written prison rule. "App. 211 When this Court ruled that the Self-Incrimination Clause of the Fifth Amendment would not allow the dismissal of a policeman solely for his refusal to waive his privilege, it nonetheless noted that if he "had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra*, the privilege against self-incrimination would not have been a bar to his dismissal." *Gardner v. Broderick*, 392 U.S., at 277, 20 L.Ed.2d, at 1086.

The Attorney General for the State of Rhode Island, in his brief on behalf of the petitioning prison officials, submits that considerations of immunity have no place in a Palmigiano-type situation and that it is of no consequence that silence may be used against the prisoner. (Brief for the Petitioners, p. 33). More particularly, the Attorney General argues, citing *Miranda v. Arizona, supra,* that the exclusionary rule will serve as a panacea at a later criminal trial regarding any statements that were unlawfully extracted from the prisoner at the disciplinary hearing. This suggestion, however, overlooks the teaching of this Court that in the area of the Fifth Amendment privilege, a person confronted with an official order to speak may either obey or remain silent and await a later judicial determination as to whether his silence was proper or contemptuous. The person may not be forced to reveal the possibly incriminatory material simply because he will have an opportunity to move to suppress it at trial. As recently as January 1975, this Court observed:

> Compliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error. *Mannes v. Meyers,* 419 U.S. 449 , 460 , 42 L.Ed.2d 574, 584 (1975).

Equally inapposite is the suggestion by the Rhode Island prison authorities that Palmigiano had no more right to use immunity than the criminal defendants in *McGautha v. California,* 402 U.S. 183, 28 L.Ed.2d 711 (1971) had to a bifurcated trial. (Brief for the Petitioners, p. 33). The choices presented in *McGautha* could not in any way lead to the obliteration of an

established constitutional right. The opportunity to give testimony in order to reduce one's penalty if convicted, at issue in *McGautha,* does not in any way enjoy the same constitutional protection as does the right to remain silent in the face of a criminal accusation. *McGautha, supra,* 402 U.S., at 218, 28 L.Ed.2d, at 732-733. Nor does the opportunity to speak on the issue of punishment reside at the very core of the adversarial process, as does the right to remain silent.

Remaining, then, is the subsidiary question as to whether or not, in the absence of a statute, the prison officials themselves may grant immunity to a prisoner in Palmigiano's situation. The United States Court of Appeals for the First Circuit ruled that they could not. *Palmigiano v. Baxter,* 510 F.2d, at 536, (1974). Counsel for your respondent has not been able to find any decisions of this Court that have spoken directly to this question. All of this Court's decisions on the immunity question have involved statutes, and the Court, on at least one occasion, has suggested that the principles embodied in the various statutes granting immunity, such as the seminal Compulsory Testimony Act of 1893, 27 stat. 443, "[have] become part of our constitutional fabric." *Ullman v. United States,* 350 U.S. 422, 438, 100 L.Ed.2d 511, 524 (1956). See also *Brown v. Walker,* 161 U.S. 591 (1896); *Counselman v. Hitchcock,* 142 U.S. 547, 35 L.Ed. 1110 (1892).

It has been suggested that, regardless of the existence of an immunity statute, there is a "constitutionally imposed use immunity", and that upon being advised of same, a witness may perhaps be barred from continuing to assert a Fifth Amendment claim. *Maness v. Meyers,* 419 U.S. 449, 42 L.Ed.2d 574 (1975) (concurring

opinion of White, J.); and indeed, in the instant matter, the applicable prison rules provide that an inmate who is charged with a violation that may also subject him to a criminal prosecution is to be advised that statements he makes in his defense "are probably not admissable for infirmative use by the prosecution at a trial. . .". Rule II (I), App. 206.

Prisoner Palmigiano submits that from an administrative point of view it would probably be more expeditious if the powers of the prison officials regarding the granting of use immunity were clearly delineated by statute, particularly when one considers that a privilege central to the adversarial process is to be relinquished in return for the immunity grant. However, were prison officials to grant use immunity, only to have the Attorney General's office attempt to circumvent the grant at a criminal trial, the accused might find relief in the Due Process Clause of the Fourteenth Amendment to the United States Constitution, for within the executive branch of government the various officials should assume the burden of "letting the left hand know what the right hand is doing or has done". *Santobello v. New York*, 404 U.S. 257, 262, 30 L.Ed.2d 427, 433 (1971) True enough, in *Santobello*, a plea bargain was apparently breached by the same office that had made it; but in matters such as that under review here it would not seem unreasonable to require that law enforcement officials within the same branch of government be bound by each others promises when the promise leads to the abandonment of a constitutional right.

CONCLUSION

Your Respondent, Nicholas A. Palmigiano, respectfully submits that this Court should hold that counsel's presence is permitted at prison disciplinary hearings where the alleged infraction of prison rules could also give rise to a future criminal prosecution, that a prisoner's silence in reliance upon the Fifth Amendment cannot be considered as evidence of his guilt and that a prisoner's proper assertion of the privilege against self-incrimination cannot be overridden except by a grant of use immunity; and that this Court affirm the decision of the United States Court of Appeals for the First Circuit in *Palmigiano v. Baxter*, 510 F.2d 534 (1974).

Respectfully submitted,
Respondent,
NICHOLAS A. PALMIGIANO,
By his Attorneys

STEPHEN J. FORTUNATO, JR.
McKINNON & FORTUNATO
1168 Newport Avenue
Pawtucket, R.I. 02861
(Rhode Island Affiliate,
American Civil Liberties Union)

DANIEL V. McKINNON
McKINNON & FORTUNATO
1168 Newport Avenue
Pawtucket, R.I. 02861

DAVID CARLINER
1511 K Street
Suite 931
Washington, D.C.